TEE THIAN SEE

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CRIMINAL APPEAL NO: 42-10-94]
14 OCTOBER 1996

CRIMINAL LAW: *Penal Code - Section 472 - Counterfeit plates - Ingredients of offence - What intention necessary - Penal Code ss. 30, 463, 464, 467, 472*

EVIDENCE: *Corroboration - Agent provocateur - Whether an accomplice - Whether evidence requires corroboration*

The appellant had been caught with 28 counterfeit plates with slips of papers containing names and sample signatures in a car driven by him after meeting with two persons who had purportedly been interested in buying the counterfeit credit cards at US$1,000 each. However, the meeting was a trap and one of the so-called purchasers was a US Secret Service Agent ('the agent').

The appellant was convicted on a charge of having in his possession 28 counterfeit credit cards, an offence punishable under s. 472 of the Penal Code. He was sentenced to four years' imprisonment and a fine of RM20,000, and in default eight months' imprisonment. The appellant appealed against his sentence and conviction.

The issues for determination in this appeal were whether all the ingredients of an offence under s. 472 were proved, ie: (i) possession and knowledge that the cards were to be used to commit forgery; (ii) that the cards were made to produce impressions; (iii) they were intended to be used for the purpose of committing forgery; and (iv) that such forgery was punishable under s. 467 for being documents purporting to be 'valuable securities', and finally whether the agent's evidence required corroboration.

Held:

[1] All the ingredients of the offence under s. 472 were proved. Firstly, it was clear from evidence that the appellant had in his possession the 28 counterfeit credit cards, knowing them to be counterfeit. Secondly, each of the 28 cards could be used to make a permanent impression of the embossed particulars on it on paper, credit card sales slips or sales vouchers, with the use of an imprinting machine.

[1a] Thirdly, the intention that needed to be proved was that the person found in possession of the counterfeit plates intended the same to be used by anybody to commit forgery and not that he intended to use them himself. The card with all the false particulars was meant to be used as genuine to create a false document in the form of a credit sales slip. There was no doubt that with the large number of counterfeit credit cards found together with the slips of papers showing the names and sample signatures, the irresistible inference was that they were intended to be used dishonestly or fraudulently.

[1b] Fourthly, the sales voucher after it was signed by the presenter would purport to be a 'valuable security' having regard to the nature of a genuine credit card transaction. The signed sales voucher would create a legal right in the retailer to be paid the face value of the sales voucher less an agreed commission and it was certainly a valuable security within the meaning of s. 30 of the Penal Code.

[2] The agent was not an accomplice but an agent provocateur who had helped to lay a trap for the appellant. It is established law that the evidence of an agent does not require corroboration.

[Appeal dismissed.]

Cases referred to:
Brannan v. Peek [1974] 2 All ER 573 ***(cit)***
In re charge Cards Services Ltd [1986] 3 WLR 697 ***(refd)***
Luchmi Singh v. Emperor AIR [1917] Pat 111 ***(cit)***
R v. Bickley 73 JP 239 ***(cit)***
R v. Heuser 6 Cr App R 76 ***(cit)***
R v. Mullins 3 Cox CC S269 ***(foll)***
Teja Singh & Anor v. PP [1950] MLJ 7 ***(foll)***

Legislation refered to:
Penal Code, ss. 30, 463, 464, 467, 472

For the appellant - Jeffrey Fernandez; M/s Fernandez & Co
For the respondent - Sallehuddin Saidin, DPP

Reported by Anne Khoo

JUDGMENT

KC Vohrah J:

In the Sessions Court, Kuala Lumpur, the appellant (hereinafter 'the accused') was found guilty and convicted on the following charge:

> That you, on or about 8 May 1991, at about 1729 hours, at the front of Equatorial Hotel, Jalan Sultan Ismail, in the Federal Territory of Kuala Lumpur, had in your possession counterfeit plates, or instruments, to wit twenty-eight credit cards as per attached list, knowing the same to be counterfeit, intending that the same shall be used for the purpose of committing any forgery which would be punishable under s. 467 of the Penal Code, and that you have thereby committed an offence punishable under s. 472 of Code.

He was sentenced to 4 years' imprisonment and a fine of RM20,000 in default 8 months' imprisonment.

Facts Of Case

The prosecution's case against the accused is far from mundane.

SP17, a special agent in the U.S. Secret Service became friendly with SP18, a Malaysian residing in New York after he was informed by the New York City Police that SPI8 had some counterfeit credit cards in his possession and was being investigated. According to SPI8, the accused had left these cards in his apartment in New York.

SP17, in the meantime, was making investigation into the source in Malaysia in relation to 28 counterfeit credit cards found in the U.S. which had nothing to do with SP18.

SP18 first met the accused in Kuala Lumpur in August 1990 and then had him as a guest in his apartment in New York in September 1991.

In March 1991 SP18, while in New York, made a telephone call to the accused in Malaysia requesting the accused to provide him withh 10 counterfeit credit cards. In April, SP18 received 10 counterfeit credit cards through the mail and SP17 arranged to wire payment for the cards which were purchased at US$1,000 each.

In May 1991 SP18 with SP17 came to Kuala Lumpur. This was after SP18 had telephoned the accused that he needed 30 Gold cards and that he was going to Kuala Lumpur and would be staying at Hotel Equatorial. The accused according to SP18 wanted US$1,000 each card.

On 8 May 1991 at between 4 to 5pm, PW18 waited in front of Hotel Equatorial. The accused arrived at the hotel in a car and SP17 got into the car and sat in the passenger's seat in front. The accused drove off and the accused took a large envelope from under SP18's seat and handed it over to SP18. SP18 found 3 smaller envelopes inside the large envelope. The accused told SP18 that he had only 28 cards, not 30, and SP18 agreed to buy them. SP18 found that the 3 smaller envelopes contained cards which were "American Gold Card, Master Gold Card and Visa Gold Card." He also found slips of paper each written with a number and the type of credit card and it also had a signature. He put the cards and slips into the smaller envelopes and inserted these into the large envelope and handed the large envelope to the accused. All the while the accused was driving the car. When the car arrived in front of the hotel, SP18 alighted from the car ostensibly in order to get the money to pay for the cards.

Earlier, when SP17 and SP18 arrived in Kuala Lumpur, they had informed the police about the intended purchase of the counterfeit credit cards from the accused and the police arranged for SP18 to request the accused to come to Hotel Equatorial on 8 May 1991.

Inspector Iskandar (SP1) from the Malaysian Police and a team of police personnel monitored the movements of the accused as soon as he arrived at the hotel on the said date at about 5.15p.m.. He saw SP18 get into the accused's car and he tailed the car as it drove along Jalan Pinang and back to the hotel where SP18 alighted from the car. Shortly after that the police intercepted the car and arrested the accused.

SP1 took over the wheel of the car and with the accused and some police personnel in the car went to the Police Headquarters at Bukit Aman.

On arrival there, SP1 examined the car in the presence of the accused and discovered an envelope containing 3 smaller envelopes which had 28 cards under the seat next to the driver's seat. They appeared to be 8 American Express Cards, 8 Hongkong Visa Gold Cards, 7 Standard Chartered Visa Gold Cards, 5 MBf Master Gold Cards, each of them bearing a name of a different person. None of them had signatures affixed on the panels at the back of the cards.

In one of the three smaller envelopes were found 30 slips of paper (P7 (1-30)). All the slips indicate names and numbers and show signatures. Most of them are handwritten. There are some slips which are credit card imprints and two have been attached to two slips which are handwritten. There are 30 names but 28 names and numbers correspond with the names and numbers of the 28 cards.

The learned Judge accepted the prosecution evidence that the credit cards were not issued by the Banks or Institutions which purported to issue them and that they were all counterfeit cards. In any event there is no dispute that they are counterfeit credit cards.

There was however dispute that some of the said cards that were produced in Court were not amongst those that were recovered from the accused.

I am however satisfied with the finding of the learned Judge and her reasons for so finding that those were the ones that were recovered.

Defence

When the accused was called upon to make his defence on the charge he elected to remain silent but he called two witnesses. One was a senior police officer who had expressed an opinion which was reported in a newspaper that it is not an offence to be in possession of a forged credit card unless the person uses it and that he had suggested amending the law so that possession of a forged credit card would be an offence. The next witness, Neo Tim Heng, stated that he made all the 28 cards for the accused as the accused had intended to sell them and that he received a cheque of RM14,800 for the forged cards.

Offence Under S. 472

Section 472 of the Penal Code (the Code) under which the accused was convicted reads as follows:

> Whoever makes or counterfeits any seal, plate, or other instrument for making an impression, intending that the same shall be used for the purpose of committing any forgery which would be punishable under s. 467, or with such intent has in his possession any such seal, plate, or other instrument, knowing the same to be counterfeit, shall be punished with imprisonment for a term which may extend to twenty years, and shall also be liable to fine.

Ingredients Of Offence

The ingredients of the offence that have to be proved in this case are:

(1) That the accused had in his possession 28 plates and that he knew them to be counterfeit;

(2) That such plates were made to produce impressions;

(3) That the plates were intended to be used for the purpose of committing forgery;

(4) That such forgery was punishable under s. 467 i.e. in this case that the plates were intended to be used to forge documents which purport to be "valuable securities."

First Ingredient – Possession And Knowledge

The evidence was clear that the accused had in his possession the 28 credit cards. The evidence was overwhelming that these 28 credit cards were counterfeit cards having regard to the defination of "counterfeit" in s. 28 of the Code. It was not just one counterfeit card that he had - he had 28 counterfeit cards in addition to his own valid credit card - and the Judge's finding that he knew them to be counterfeit is clearly sound. That the accused knew the cards to be counterfeit is also borne out by the fact that 28 of the 30 slips of paper found with the cards showed that against each of the names in the slips corresponding with each of the names in the counterfeit card there was what appeared to be a purported signature relating to the name and the inference is that whoever was to use the card had to forge such signature. Then again the evidence of SP18 who pretended that he was going to buy the cards and the evidence of SP17, the us secret service agent, clearly reveals that the accused know the cards to be counterfeit.

Accomplice Or Agent Provocateur

Counsel for the accused had attacked SP18 and SP17 as being unworthy of credit as their per verse conspiracy to get someone to commit a crime led to the accused to do what he did. He referred to them as accomplices who needed corroboration for their evidence. The learned Judge however considered SP18 as an **agent provocateur** and said that his evidence did not require corroboration. I agree with the view of the learned Judge that SP18 was an **agent provocateur** and I would go further to say SP17 too was one as they had together with the Malaysian police laid a trap for the accused. And the evidence of an agent provocateur is not that of an accomplice and does not require corroboration: *Teja Singh & Anor. v. PP* [1950] MLJ 71. In *Teja Singh* Spenser Wilkinson J (as he then was) considered *Brannan v. Peek* [1974] 2 All ER 573 (which was also relied upon by Counsel for the accused), *R v. Mullins*, 3 Cox CC 5269, *R v. Bickley* 73 JP 239 *R v. Heuser* 6 Cr App R 76 and quoted this passage with approval from *R v. Mullins*,

> An accomplice confesses himself a criminal, and may have a motive for giving information, as it may purchase immunity for his offence. A spy, on the other hand, may be an honest man, he may think that the course he pursues is absolutely essential for the protection of his own interests and those of society; and if he does so, if he believes that there is no other method of counteracting the dangerous designs of wicked men, I can see no impropriety in his taking upon himself the character of an informer. The government are, no

doubt, justified in employing spies; and I do not see that a person so employed deserves to be blamed if he instigates offences no further than by pretending to concur with the perpetrators. Under such circumstances they are entirely distinguished in fact and in principle from accomplices, and although their evidence is entirely for the jury to Judge of, I am bound to say that they are not such persons as it is the practice to say require corroboration.

Second Ingredient – That Plates Made To Produce Impressions

I pause here to say that the expert witnesses in this case did not distinguish between credit cards and charge cards and debit cards. Suffice it to say the expression "credit card" is used for convenience in this case to mean all three types of cards meaning a card which entitles the holder, upon presentation, to obtain goods and/or services from a retailer, because prior arrangements have been made between the retailer and the issuer of the card which allows goods and/or services to be provided on the basis that payment will be made by the issuer to the retailer (see *In re charge Cards Services Ltd.* [1986] 3 WLR 697).

The evidence and an inspection of the cards show all 28 cards to be plates, hard flat material, albeit all of plastic material, and they all have particulars - names, letters and numbers - embossed on them.

I now come to the second ingredient of the offence, - that such plates were made to produce impressions. Each of these 28 cards, according to the expert witnesses, can be used to make a permanent impression of the embossed particulars on paper, on credit sale slips or sales vouchers, when used with an imprinting machine.

Third Ingredient – Plates Intended To Be Used For Forgery

I now come to the third ingredient, the intention of the accused in respect of the 28 counterfeit credit cards in his possession. The intention that needs to be proved as stated in s. 467 is "Whoever ... intending that the same shall be used for the purpose of committing any forgery..." not "Whoever ... intending to use the same for committing any forgery ...". The language to my mind shows that the intention is not for the person found in possession of a counterfeit seal, plate or other instrument to himself use the same to commit forgery; it is sufficient if the intention is that the same be used by anybody to commit forgery and I reject the argument of Counsel for the accused that it is necessary for the prosecution to prove that the accused had himself intended to use the counterfeit credit cards for forgery. His argument was that the prosecution had not proved that he was going to use them for himself to commit forgery but, in fact had showed that he intended to sell the cards to SP18.

As to the necessity of proof that the plates were intended to be used for the purpose of committing forgery, it is quite clear that in respect of each of the 28 counterfeit credit cards the falseness of the card is that it pretends to be issued by the issuer of that particular card, it pretends to be issued to the person named as holder of the card, it pretends to be issued under a genuine account number of the issuer, it pretends to have a genuine validity period for its use. The card with all the false statements is meant to be used as genuine upon presentation to a retailer to obtain good and/or services from the retailer where the retailer has had prior arrangements with the issuer of the genuine credit card to allow goods and/or services to be provided on the basis that payment will be made by the issuer to the retailer.

When a credit card is presented to the retailer after a purchase the card is used to make a permanent impression on a credit sale slip or a sales voucher through the use of an imprinting machine. The card is used to create a document, a sales voucher. If a counterfeit card is used what it does is to create a false document. What is further required is a signature purporting to be that of the presenter of the card and once that has been obtained the sales voucher becomes a purported "valuable security" within the meaning of s. 467 of the Code and I shall deal with this matter later.

Does the sales voucher require a signature of the presenter of the card in all case where a credit card is used? In the context of this case it is not necessary to consider those cases where cards (although not signed) "are capable of being used to make (sales) transaction." As was explained by SP16, the Vice President of Security Mismanagement, Master Card International of the Asian Pacific Region and who has had 13 years experience, *inter alia*, in the detection of counterfeit cards, such circumstances would apply for mail order or telephone order purchases where the presence of the card is not necessary to perform the transaction.

In respect of each of the 28 counterfeit credit cards no signature appears on the back panel. The signature on the panel on a genuine credit card is for verification of the signature on the sales voucher affixed by the presenter of the card. In connection with this, SP16 gave his expert view, that in the case of a (genuine) credit card the mere fact that a person may have innocently forgotten to sign his card would not necessarily prevent its use at a merchant location and in such a case the merchant may simply request the presenter of the card to sign his name on the signature panel and where he deems it appropriate seek advice from the bank with whom he has a merchant agreement in respect of the card. This expert witness expressed the view, again a reasonable and certainly a commensensical view, that in the case of counterfeit cards they are often supplied unsigned in order that they may be

sold or used by the recipients or other persons simply by signing a name in any convenient style that suits them in the sales slip.

There is need to prove that the intention is that the counterfeit cards shall be used for committing any forgery under s. 467 of the Code. Section 467 deals with the forging of a document which purports to be a valuable security or certain categories of documents mentiond therein.

In order to establish that a document is forged the prosecution must give conclusive evidence that the document is a false document within the meaning of s. 464 and further that it was forged with one of the intentions mentioned in s. 463 (see *Luchmi Singh v. Emperor* AIR [1917] Pat 111).

For our purpose, in respect of each of the 28 counterfeit cards, it has to be shown that a person may dishonestly or fraudulently make a document or part of a document denoting the execution of the document (through an impression of the card on a sales voucher and then forging a signature on it) with the intention of causing it to be believed that such document or part of the document is made by the authority of the person by whom or by whose authority it was not made. There can be no doubt whatsoever that with the large number of counterfeit credit cards found together with the slips of papers showing corresponding names and sample signatures the irresistible inference is that they were intended to be used dishonestly or fraudulently and that the cards were to be used at retail outlets for purchases of good and/or services by their presentation at these outlets for impressions to be made of them on sales vouchers and signed by the presenters.

Fourth Ingredient – Forged Document A Valuable Security

I now come to the fourth ingredient of the offence that has to be proved. That the sales voucher after it is signed by the presenter purports to be a "valuable security" is also clear (see s. 30 of the Penal Code) having regard to the nature of a genuine credit card transaction. There are 3 parties to the transaction, the cardholders the retailer and the issuer of the card. The essence of a credit card transaction is that the retailer and the cardholder have, for their mutual convenience, each previously arranged to open an account with the same company (the card issuer) and agreed that any account between themselves, if the cardholder wishes, be settled by crediting the retailer and debiting the cardholder's account with the issuer of the card (see *In re Charge Card Services Ltd.* [1986] 3 WLR 697).

In a sales transaction involving a credit card, the cardholder will sign on a sales voucher after the cardholder has had his card used for imprinting on the sales voucher. The sales voucher would be in 3 copies, one for the cardholders

the other for the retailer and the third for the card issuer. The card issuer on receipt of the third copy will in due course pay to the retailer the face value of the sales voucher less an agreed commission (see *In re Charge Card Services Ltd.* 702). What the signed sales voucher does is to create a legal right in the retailer to be paid the face value of the sales voucher less an agreed commission and it is certainly a valuable security within the meaning of s. 30 of the Code.

Thus when any of the 28 counterfeit cards is used by a person for a credit card transaction for the purchase of goods or service and the signature on the sales voucher is forged by him, he forges a document which purports to be a valuable security and clearly by his obtaining goods or services on the sale transaction through the deception he wrongfully gains from the transaction.

In my view all the ingredients of the offence have been satisfied in the case. Although the learned judge of the Sessions Court did not give an explanation as to the law involved her findings were in accordance with the law that the accused had committed the offence, he was charged with. In the circumstances the conviction is affirmed. I can see no reason to interfere with the sentence, The appeal against conviction and sentence is dismissed.